

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
JAN 26 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television Fixed)	
Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

COMMENTS OF COLUMBIA FM LIMITED PARTNERSHIP

Columbia FM Limited Partnership ("Columbia FM"), pursuant to Section 1.415(a) and (b) of the Commission's Rules, by counsel, hereby files its comments in this proceeding.¹

Columbia FM is a state of Washington limited partnership organized specifically in 1989 to file for the then-new Vancouver, Washington FM allocation on Channel 290C2.² In April, 1989, Columbia FM filed an application for the Vancouver allocation. Although the Commission conducted an evidentiary hearing on the Vancouver, Washington allocation, as a result of the Commission's freeze of the comparative process, the FCC precluded the filing of appeals of the initial decision. The Vancouver case has been on hold since February 1994.

¹ *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, MM Docket No. 97-234, *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, GC Docket No. 92-52, *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, GEN Docket No. 90-264 (rel. November 26, 1997) ("NPRM").

² FCC File No. BPH-890413 NH. *See also* MM Docket No. 90-418.

In this *NPRM*, the Commission proposes to auction pending mutually exclusive applications for new commercial full power broadcast stations filed before July 1, 1997, as well as mutually exclusive applications for any initial license or construction permit for commercial or analog television stations filed after July 1, 1997.³ The Commission proposes to refund all hearing fees paid by applicants in which it would select the permittee by competitive bidding and filing fees paid by applicants who choose not to enter the auction.⁴ The Commission seeks comment on policies for settlements of mutually exclusive application situations.⁵ Finally, the Commission seeks comments on whether it should review the qualifications of applicants with pending applications prior to any auction.⁶

I. THE COMMISSION SHOULD AUCTION ALL MUTUALLY EXCLUSIVE APPLICATIONS FOR ANY INITIAL LICENSE FOR A COMMERCIAL RADIO OR ANALOG TELEVISION STATION.

A. The Plain Language of the Statute Indicates That the Commission Should Use Auctions.

1. Last year, Congress passed the Balanced Budget Act of 1997⁷ (the "Act"). Section 3002(a)(3) of the Act amended section 309(j) of the Communications Act of 1934, as amended, to require the Commission to use auctions to award licenses in the majority of initial licensing proceedings involving mutually exclusive applications. Although section 309(j) had previously granted the Commission the discretion to use auction authority for certain communication services, it had not permitted the Commission to auction broadcast licenses. The Act also added a new section 309(l) which provides that for competing applications for initial licenses filed before July 1, 1997, the Commission shall: (1) have the authority to auction these

³ *NPRM* at ¶ 10.

⁴ *Id.* at ¶ 16.

⁵ *Id.* at ¶ 27.

⁶ *Id.* at ¶ 30.

⁷ Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251.

licenses; (2) limit the pool of bidders in the auction to the persons who filed their applications before July 1, 1997; and (3) waive appropriate regulations to encourage settlements between the competing applicants for a 180-day period.⁸

2. The precise language of section 309(l) states that "the Commission shall . . . have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) to assign such license or permit."⁹ Columbia FM agrees with the Commission that the plain language of the statute provides the Commission with the discretion to use auctions to select among pending mutually exclusive applications filed before July 1, 1997.¹⁰ However, Congress would not have deliberately added the new section to an existing statute and made explicit reference to section 309(j), amended at the same time, if it did not intend the Commission to use this authority.

B. The Legislative History Demonstrates Congress' Intent That The Commission Be Required to Auction All Broadcast Licenses.

3. The Conference Report to the Act provides that "[n]ew section 309(l) of the Communications Act *requires* the Commission to use competitive bidding to resolve any mutually exclusive applications for radio or television broadcast licenses that were filed with the Commission prior to July 1, 1997."¹¹ Even though the statute appears to permit the Commission to either auction the licenses or use another means to select the permittees, the *Conference Report* "requires" the Commission to use auctions. Courts have long recognized that committee

⁸ 47 U.S.C. § 309(l). In Congressional hearings and elsewhere prior to the enactment of the Act, former Chairman Hundt and others specifically requested the extension of auction authority to include new analog radio and TV licenses because of the problems with comparative hearings and lottery selection. *See, e.g.*, "Statement of Reed E. Hundt, Chairman of the Federal Communications Commission, Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, House of Representatives, February 12, 1997, at 14-15; "The Hard Road Ahead -- An Agenda for the FCC in 1997," December 26, 1996, at 14.

⁹ 47 U.S.C. § 309(l).

¹⁰ *NPRM* at ¶ 13.

¹¹ H.R. Conf. Rep. 217, 105th Cong. 573 (1997), 1997 U.S.C.C.A.N. (111 Stat.) 193 (hereinafter "*Conference Report*") (emphasis added).

reports, and in particular conference reports, are the most authoritative form of legislative history.¹² The Commission cannot ignore the clear and strong language contained in the *Conference Report*, which instructs the Commission to conduct auctions to select permittees for these licenses.

4. In addition to providing auction authority for broadcast licenses, the Act terminated the Commission's authority to use random selection to award initial licenses after July 1, 1997.¹³ By eliminating another selection method, Congress further demonstrated its intent to require the Commission to use auctions to select permittees for these licenses.

5. At the same time it added the new section 309(l), Congress amended section 309(j) to increase substantially the instances in which the Commission would be required to use auctions.¹⁴ Congress did not include mutually exclusive radio and television licenses filed before July 1, 1997 in its list of exemptions to the mandatory use of auction authority. The conspicuous absence of this group of license applicants from the list of exemptions further indicates that Congress intended the Commission to use auctions to select permittees for these licenses, as well as for all applications filed after July 1, 1997.

6. Congress' inclusion of provisions to permit broadcast auctions and terminate lotteries, coupled with its omitting the selection of these licenses from the exemptions to the Commission's expanded auction authority and its strong legislative history language mandating the use of auctions, compels the Commission to use auctions to award initial radio and television licenses filed before July 1, 1997. Any other action on the part of the Commission would

¹² See generally Jorge Carro & Andrew Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 *Jurimetrics J.* 294, 354 (1982) (finding that over a 40-year period more than 60 percent of the Supreme Court's citations to legislative history were references to Committee reports).

¹³ 47 U.S.C. § 309(i).

¹⁴ 47 U.S.C. § 309(j).

constitute blatant disregard for Congress' intent as expressed in three distinct statutory provisions and the *Conference Report*, the best source of legislative history.

7. Columbia FM notes attempts by certain parties to alter the solid legislative history undergirding the Act *ex post facto*, in order to discourage the Commission from using auctions and to benefit their individual applications. Columbia FM appreciates that the Commission fully realizes the legislative process ends upon enactment and applauds the Commission for affording these attempts only the slight attention they deserve.

C. The Commission's Prolonged Inability to Develop Comparative Hearing Criteria Has Foreclosed The Option of Comparative Hearings.

8. The Commission's criteria for comparative hearings were first successfully challenged in 1992.¹⁵ The Commission has had more than five years to develop workable comparative hearing criteria, but has failed to do so. The courts have specifically invalidated individual criteria¹⁶ and the Commission apparently has made little progress in developing new standards. The Commission should follow Congressional intent and abandon any pretense of developing comparative measures.

9. The Commission seeks comment on whether it should use comparative hearings for a portion of pending cases.¹⁷ If the Commission decides to award even a limited number of licenses by comparative hearings, it will need to develop new comparative hearing criteria. Even if the Commission develops better criteria than those previously employed, the criteria will be challenged in court and will not become effective for several years. At that point, all pending

¹⁵ See *Bechtel v. F.C.C.*, 957 F.2d 873 (D.C. Cir. 1992) (remanding a comparative proceeding and instructing the Commission to explain its reliance on a specific criterion).

¹⁶ See *Bechtel v. F.C.C.*, 10 F.3d 875, 878 (D.C. Cir. 1993) (finding one of the Commission's comparative hearing criteria to be arbitrary and capricious and thus unlawful.) (hereinafter "*Bechtel II*").

¹⁷ *NPRM* at ¶ 14.

applicants would have to be able to amend their applications in light of any newly-adopted standards.¹⁸ This lapse in time will further harm the applicants who have had their license applications frozen for nearly four years already, and will deny the benefits to the public of service, stymied by the protracted nature of the hearing process.

D. Fundamental Notions of Equity and Fairness Require The Commission to Auction the Licenses.

10. Columbia FM agrees with the Commission that auctions will serve better the public interest than deciding cases by comparative hearing¹⁹ because "auctions would likely lead to a more speedy resolution of these pending cases, thereby serving the public interest in getting service to the public sooner."²⁰ Columbia FM supports the Commission's long-standing view that "comparative hearings can be cumbersome, costly, and delay service to the public without substantial offsetting public interest benefits in terms of selecting the 'better' applicant, because the selection often turns on minimal distinctions."²¹ Indeed, auctions will expedite award of the licenses, some of which have been pending for more than 10 years. Columbia FM's application was filed in 1989. The Commission should be concerned that service to the public in some areas has been delayed for more than a decade, and, therefore, use the most expeditious method to award licenses to allow permittees to begin broadcasting.

11. Columbia FM supports the Commission's interpretation that pending applicants have no right to a comparative hearing under the statute.²² Columbia FM concurs with the Commission's view that that, even if a pending applicant did have an expectation that its

¹⁸ The Commission has already recognized this issue in the *Second Further Notice of Proposed Rulemaking*, GC Docket No. 92-52, 9 FCC Rcd 2521 (¶8) (1994), in which it sought comment on this very issue.

¹⁹ *NPRM* at ¶ 14.

²⁰ *Id.* at ¶ 17.

²¹ *Id.* at ¶¶ 3, 19.

²² *Id.* at ¶ 10.

application would be decided through the comparative hearing process, the court's decision in *Bechtel II* finding this process to be unlawful "prevents us [the Commission] from deciding pending cases completely in accordance with the applicant's reasonable expectations at the time of filing."²³

II. THE COMMISSION SHOULD REFUND APPLICANTS' FEES PAID UNDER THE COMPARATIVE HEARING PROCESS.

12. Columbia FM agrees with the Commission that if it decides to auction the licenses, it should refund all hearing fees for all applicants and the filing fees of applicants who choose not to participate in the auction.²⁴ Basic notions of equity dictate that applicants should not pay fees for proceedings they ultimately do not participate in to the full extent through no fault of their own. Columbia FM believes that the Commission should go one step further and refund legal fees for the costs of prosecution incurred by applicants participating in hearing proceedings that were put on hold after the Commission's inability to develop new criteria in the wake of *Bechtel II*.²⁵ If the Commission abandons its flawed comparative hearing process, it should make whole applicants who suffered costs and inconvenience, as a result of the Commission's failure to cure the defects of the hearing process.

III. THE COMMISSION SHOULD NOT REVIEW THE QUALIFICATIONS OF APPLICANTS PRIOR TO AUCTION, UNLESS THEY HAD BEEN PREVIOUSLY JUDGED TO BE FINANCIALLY UNQUALIFIED WITH FINALITY.

13. The Commission seeks comment on whether it should review the basic qualifications of pending applicants prior to any auction.²⁶ While Columbia FM acknowledges a

²³ *Id.* at ¶ 15.

²⁴ *Id.* at ¶ 16.

²⁵ Such funds could be passed out of the auction revenues from station licenses. The Commission has considerable experience evaluating reimbursement for legitimate and prudent expenditures. 47 C.F.R. § 73.3525.

²⁶ *NPRM* at ¶ 30.

remote risk that a winning bidder will be found disqualified, reviewing the qualifications of each bidder prior to any auction will be time-consuming, produce long delays, and hinder the delivery of services to the public. Any pre-auction review will cause bidders and third parties to file petitions attacking the qualifications of applicants. Resolving these petitions prior to the auction will produce long delays and force applicants to wait an even greater amount of time before they receive licenses and can begin providing service.

14. If at some point in a comparative hearing proceeding an applicant was found unqualified, but the decision was not a final decision, the applicant should not be prohibited from bidding in any auction. As the Commission acknowledges, there remain few pending hearing cases,²⁷ and, therefore, few applicants to bid in any auctions. The Commission should strive to ensure that as many bidders as possible can enter any auctions. A larger number of bidders will produce a greater amount of revenues and serve the public interest by increasing the number of providers of services that compete in any auction. Further, permitting these applicants to participate in the auction would be consistent with the Commission's actions in previous auctions.²⁸

IV. THE COMMISSION SHOULD ENCOURAGE SETTLEMENTS AFTER THE 180 DAY SETTLEMENT WINDOW.

A. Congress Has Instructed The Commission to Encourage Settlements.

15. To comport with Congress' intent, the Commission should encourage settlements, even after the 180-day settlement period set forth in section 309(l) expires. Section 309(j)(6)(E) requires that nothing in the use of auctions should "relieve the Commission of the obligation in

²⁷ *Id.*

²⁸ For example, the Commission allowed NextWave to bid in the in C Block PCS auction, even though there were questions surrounding its qualifications to bid in the auction. These questions were resolved appropriately after the conclusion of the auction. See *In re Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses*, 12 FCC Rcd 2030 (W. Tel. Bur. 1997).

the public interest to continue to use . . . negotiation . . . and other means in order to avoid mutual exclusivity."²⁹ The statute contemplates the Commission fulfilling an obligation to negotiate settlements to avoid situations of mutual exclusivity. The *Conference Report* strongly reminds the Commission not to neglect this obligation:

First, the conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.³⁰

The Commission should follow the intent of the Congress that passed section 309(j)(6)(E) and the subsequent Congress that specifically directed the Commission to use negotiations to reach settlements among applicants for pending broadcast licenses.

16. On two occasions other than the Act, Congress addressed the issue of the Commission's auction authority and did not change the provisions governing settlements. In 1993, Congress first authorized the Commission to conduct auctions, and did not amend section 47 U.S.C. § 311(c), which provides the framework for settlements of mutually exclusive license applications. The Commission should read Congress' inaction as reflecting its satisfaction with the settlement provisions. Similarly, in the conference report to the 1995 budget bill, the conferees stated their belief that the Commission should encourage settlements.³¹

²⁹ 47 U.S.C. 309(j)(6)(E).

³⁰ *Conference Report* at 192.

³¹ "The FCC is required to continue its obligation under section 309(j)(6)(E) to take actions necessary to avoid situations of mutual exclusivity." 141 CONG. REC. H12758 (daily ed.). This bill passed both chambers of Congress and was subsequently vetoed by the President.

B. The Commission Would Serve the Public Interest By Encouraging These Settlements

17. The Commission should encourage settlements, even if they occur after the 180-day settlement window because settlement serve the public interest by expediting service to the public.

CONCLUSION

For the foregoing reasons, Columbia FM urges the Commission to auction all radio and television authorizations where applicants filed before July 1, 1997, whether or not these applications had been designated for hearing. Further, the Commission should refund applicants' fees paid to the FCC, as well as reimburse applicants for legitimate and prudent expenditures. In addition, the Commission should not review applicants' qualifications prior to any auction. The Commission should continue to encourage settlements, even after the 180 day window prescribed in the Act.

Respectfully submitted,

COLUMBIA FM LIMITED PARTNERSHIP

By: 

Stephen Diaz Gavin
Jeffrey L. Ross
PATTON BOGGS, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037
(202)-457-6000

Its Attorneys